The right of indigenous peoples to consultation about major development projects

Indigenous peoples are especially affected and vulnerable to major development projects

An estimated 370 million indigenous peoples live in 77 countries and inhabit 20% of the world's land surface[1]. These vast territories, which are among the few still protected areas, are essential to preserving biodiversity. However these territories also contain significant mineral and hydraulic[2] resources and thus are particularly coveted by industrial companies[3] undertaking major development projects, leading all too often to serious violations to the rights of local populations' as well as irreversible environmental degradation.

States justify these major development projects with the need to "develop" their country and with the priority of "national interest" over individual interests. Hence, in Peru, a decree states that "the mining industry and the promotion of investment in this sector are in the national interest[4]", curtailing any opposition to major development projects in this area.

However, these major development projects have impacts that contribute to climate change[5] and alter the way of life of indigenous peoples: forced displacement, desertion of sacred sites, water contamination, and destruction of living and working environments, etc. violating indigenous people's right to self-determination[6] as well as indigenous peoples' right to determine their own priorities within the development process[7]. While we will have to rethink the Western development approach, it appears essential to build upon the virtuous model of development espoused by indigenous peoples[8]. As pointed out by the High Commissioner for Human Rights, Navanethem Pillay, "strategies based on the narrow pursuit of economic growth without due regard for equity and related environmental, social, and human rights considerations will both fail in their economic objectives, and risk damaging the planet, and the fundamental rights of the people who live here[9]".

In this context, implementing indigenous peoples' rights to consultation on any measures which may affect them directly, as recognized by International Labor Organization Convention n°169 (ILO169) and their right to free, prior and informed consent (FPIC), as recognized and stipulated by United Nations Declaration on the Rights of Indigenous Peoples[10], is a mean of preserving their human rights.

Consultation is not automatically participation, nor consent

In practice, the right to consultation is often limited to a mere process by which research is conducted and project impacts are clarified in order to obtain the consent from communities concerned by major development projects. This process leaves the door open to all sorts of pressure and manipulation.

In the majority of cases, the final opinion of the population does not determine the decision to pursue a project. This is the case, for example, in Ecuador, where a decree reduces prior consultation to a simple formality in which indigenous

[1] UNDPI, State of the World's Indigenous Peoples, Chapter 3, January 2010, DPI/2551/L
[2] The Declaration of the International Conference on Extractive Industries and Indigenous Peoples, march 2009
[3] Permanent Forum on Indigenous Issues, Consolidated report on extractive industries and their impact on indigenous peoples, May 2013, E/C.19/2013/16
[4] Presidency of the Republic of Peru, Supreme Decree N° 014-92-EM, June 1992
[5] GIEC, Changements climatiques 2013 : les éléments scientifiques, octobre 2013
[6] United Nations Declaration on the Rights of Indigenous Peoples, October 2007, article 3, A/61/L.67 and Add.1
[7] ILO, C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169), article 7
[8] The Guardian, Buen vivir: the social philosophy inspiring movements in South America, February 2013
[9] Navanethem Pillay, Open Letter to Member States Regarding Rio+20, march 2012
[10] United Nations Declaration on the Rights of Indigenous Peoples, October 2007

people have no opportunity to object to the project. The decree specifies if the participants are opposed to the project "it will not be realized, unless the competent authority insists on its implementation[11]". One could translate this as simply confirming projects already approved by the State and for which any contrary opinion will not be taken into account.

Sometimes a consultation takes place when license has already been awarded or construction started. This was the case in Bolivia, concerning the Isiboro Secure Indigenous Territory and National Park (TIPNIS) road project, where a series of legal and administrative provisions authorizing the road were approved prior to any consultation of local indigenous communities[12].

In other cases, governments and multinational companies intimidate people in order to influence their position. This case is evident in where the Brazilian government plans to build the São Luís do Tapajós hydroelectric dam and a military operation has been established on indigenous Munduruku territory[13].

These examples illustrate the limitations of the right to consultation, which is, in its application, not synonymous for participation in decision making nor the application of the right to free, prior and informed consent.

We assert that the true purpose of consultation is not to reach an agreement or consent, but rather the possibility for indigenous people to decide their own development priorities, with influence over decisions made by the State. The right to effective participation in decision-making processes should also result in an indigenous right to veto on any project that could impact them, whether they be legislative measures or infrastructure projects.

Shortcomings in terms of consultation concerning Brazilian large dam projects

Brazil is one of only twenty-two states to have ratified ILO Convention n°169. We would like to draw the Council's attention to the severity and recurrence of violations of the indigenous right to consultation concerning the approval and construction of large dams in Brazil.

In Brazil, 77% of electricity produced is hydroelectric[14]. Although Brazil ratified ILO Convention n°169 in 2002, according to the office of Brazil's Federal Public Ministry (MPF) no hydroelectric dam built by the Brazilian government in the Amazon has observed the Convention[15]. Since Amazonian rivers (Madeira, Tocantins, Araguaia, Xingu and Tapajós) account for 63% of Brazil's "hydroelectric potential", the risk of violations of rights of indigenous peoples is particularly acute in this region.

One of the most emblematic cases of rights violation is that of the approval and construction of the Belo Monte dam, undertaken by multinational companies including GDF-Suez and Alstom. Irregularities in the approval process of the hydroelectric project adjacent to indigenous lands have been repeatedly denounced. The Inter-American Commission on Human Rights (IACHR) undertook legal proceedings and called on Brazil to suspend the dam until indigenous consultation had been carried out. In reaction to this, the Brazilian government cut its relations with the institution, until it no longer requested suspension of the project[16].

[11] Presidency of the Republic of Ecuador, Decree n° 1040, article 22, April 2008

[12] Amnesty International, Open letter to the authorities of the Plurinational State of Bolivia in the context of the dispute concerning the Isiboro Secure Indigenous Territory and National Park, May 2012

[13] Federal Public Prosecutors' Office, April 2013, http://www.prpa.mpf.mp.br/news/2013/justica-suspende-operacao-tapajos

[14] International Rivers, O setor elétrico brasileiro e a sustentabilidade no século 21, November 2012

[15] Federal Public Prosecutors' Office, January 2014, http://www.prpa.mpf.mp.br/news/2014/mpf-recomenda-sem-consulta-previa-e-avaliacao-ambiental-usina-jatoba-deve-parar

[16] Florence Higuet, Brésil: le barrage de Belo Monte, RAMPEDRE, November 2012

Plans to build hydroelectric dams on the Tapajós River are similarly flawed. Hence, in 2013, MPF Federal Prosecutors, in response to the mobilization of local indigenous communities, requested that the licensing process for three dams on the Tapajós be halted until the consultation of indigenous peoples had taken place[17].

Thus we express our deep concern about violations of the right to consultation of indigenous peoples threatened by major development projects in Brazil. Additionally, we call on States to assume their responsibilities and the obligation to protect people's fundamental rights on their territory against companies, as promoted by the UN Guiding Principles on Business and Human Rights[18].

Recommendations

We urge States to:

- implement true consultation mechanisms, in the context of large dams and extractives projects, to seek to establish more equitable relations between transnational corporations and indigenous peoples, enabling these communities, where appropriate, to prevent the implementation of these projects.
- sign, ratify and observe ILO Convention n°169;
- observe their international commitments, including the United Nations Declaration on the Rights of Indigenous Peoples, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights;
- apply the United Nations Guiding Principles on Business and Human Rights;

We seek to draw attention of the following special rapporteurs on violations of the right to consultation of indigenous peoples:

- Special Rapporteur on the rights of indigenous peoples
- Special Rapporteur on the Human Rights of Internally Displaced Persons
- Special Rapporteur on the human right to safe drinking water and sanitation

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Amazon Watch, Amnesty International France, Association of International Lawyers NGO(s) without consultative status, also share the views expressed in this statement.

[17] Federal Public Prosecutors' Office, June 2013, http://ef.amazonia.org.br/2013/06/indios-afetados-por-hidreletricas-tres-processos-judiciais-nenhuma-consulta/

[18] United Nations Guiding Principles on Business and Human Rights, March 2011, A/HRC/17/31